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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 36

HARICE LEROY CARTER,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR RESPONDENT.

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Respondent.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

CHAMPLIN-SHEALY COMPANY, CHICAGO 365

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BRIEF FOR RESPONDENT.

RESPONDENT'S RESTATEMENT OF THE CASE.

Counsel for the petitioner, commendably anxious to say nothing that might prejudice the man whom this court has appointed him to defend, has failed to make it clear that the physical documents lodged by petitioner with the clerk of the Illinois Supreme Court contain much written interpolation by petitioner that did not and could not possibly constitute matter of judicial record of which that court could take cognizance in reviewing petitioner's conviction.

Petitioner was without legal skill and failed to appreciate that the principles of appellate review depend upon the concept of an authenticated record as distinguished from mere written assertions of a litigant. Accordingly he deposited with the clerk of the Supreme Court of Illinois a duly and properly certified common law record, the contents of which will be hereafter summarized to the extent material to present the issues in this case. But he attached to this properly prepared and properly certified common law record the following papers, none of which was authenticated or certified in accordance with the rules of Illinois appellate procedure and all of which constituted wholly extra-judicial utterances of his own:

(1) A purported copy of a paper entitled "Information to Board of Managers, Illinois State Penitentiary," the original supposedly having been signed by the state's attorney and judge presiding at his trial.

(2) A document entitled "Abstract of Testimony at Hearing on Question of Mitigation or Aggravation, June 18, 1928." This document, which comprises pages 14 to 40 of the transcript, reads very much like a partial narrative condensation (it does not even purport to be a complete recension) of testimony taken in open court. It purports to summarize some (but does not even purport to summarize all) of the testimony that was taken upon the hearing by reducing it to narrative form. **But this purported abstract of testimony was never approved or certified by the trial judge as a bill of exceptions or report of proceedings at the trial, nor was it even filed with the clerk of the trial court, nor does the clerk of the trial court certify that this narrative formed any part of the records of his court. Its authorship is anonymous.**

(3) A petition for writ of error (such petitions are not in use in Illinois, writs of error being procurable by the filing of a *praecipe* therefor), in which petitioner undertakes further narrative statement, not merely of what he

says occurred or was proved at the trial, but of alleged misconduct in the matter of petitioner's arrest, alleged attempts to extort a confession, and other alleged abuses of petitioner's civil rights.

None of the three items above mentioned constituted any part of the record of the judicial proceedings that had culminated in petitioner's conviction and sentence. The Supreme Court of Illinois observes (Tr. p. 44) that there was no bill of exceptions. It states that the only record accessible to scrutiny or review was the common law record and concluded its opinion by saying:

> "Others errors assigned relate to his complaint that he was deprived of due process of law by reason of the method of his arrest and that he did not have a fair trial based upon competent evidence. There is no basis in the common-law record on which the court can review such questions. Therefore they cannot be considered. *People* v. *Lantz*, 387 Ill. 72; *People* v. *Bertrand*, 385 Ill. 289; *People* v. *Keller*, 353 Ill. 411."

But although these documents of petitioner's did not comprise a part of the record of the trial court, nevertheless they were filed with the clerk of the Supreme Court of Illinois at least in the physical sense that they were lodged or deposited with him as papers attached to the properly certified common law record; and so they do form a part of the records of the Supreme Court of Illinois. Therefore they have been certified to this court as a record of what the petitioner filed in the Supreme Court of Illinois, *not* as a record of what occurred in the trial Court proceeding of which he complains.

Yet counsel for petitioner refers to the matters, actual or alleged, recited in these extrajudicial documents precisely as though they were a part of the record in this case. We shall not refer to any of the matters which these papers purport to recite except to the extent necessary to point out in the Argument which of petitioner's

statements are supported by the duly certified common law record and which of them are predicated wholly upon these writings that form no part of that record.

The Substance of the Common Law Record of the Circuit Court of Livingston County.

On June 12, 1928, the grand jury of Livingston County returned an indictment charging petitioner with the murder by shooting of one James D. Churchill (Tr. pp. 2-8). No question is raised as to the sufficiency of the indictment.

On June 15, 1928, the following "Judgment on Plea of Guilty" was entered. The court's particular attention is called to the emphasized typography below:

> "This day come the said People by Neil Kerr State's Attorney in and for Livingston County and State of Illinois and also comes the Defendant Harice Leroy Carter commonly known as Roy Carter in his own proper person into Open Court.
>
> "And the said Defendant Harice Leroy Carter commonly known as Roy Carter is here and now by the clerk of this Court furnished with a true copy of the indictment herein with the names of the People's witnesses thereon together with a list of the petit jurors for the present term of this Court.
>
> "And the said defendant Harice Leroy Carter commonly known as Roy Carter having been duly arraigned and being called upon to plead expresses a desire to plead guilty to the crime of murder as charged in the indictment. *Thereupon the Court fully explained to the Defendant Harice Leroy Carter commonly known as Roy Carter the consequence of such plea and of all his rights in the premises* **including the right to have a lawyer appointed by the Court to defend him and also of his right to a trial before a jury of twelve jurors** *sworn in open Court and of the degree of proof that would be required to justify a verdict of guilty against him under the plea of not guilty but the defendant Harice Leroy Carter com-*

monly known as Roy Carter persists in his desire to plead guilty and for a plea says he is guilty in manner and form as charged in the indictment.

"It is therefore considered, ordered and adjudged by the Court that the defendant Harice Leroy Carter commonly known as Roy Carter stands convicted of the crime of murder charged in the indictment under his plea of guilty entered of record in this cause.

"And now this cause coming on further hearing *the Court appoints L. W. Tuesburg a duly licensed and practicing attorney and a member of the bar of this Court to represent the said defendant Harice Leroy Carter commonly known as Roy Carter on question of migitation or aggravation of said crime of murder to which said defendant has pleaded guilty,* and which said question of mi*g*itation or aggravation of said crime of murder is hereby set down for hearing before the Court on *MO*June 18th A. D. 1928 at nine thirty o'clock in the morning." (Tr. pp. 8-9.)

The recital emphasized above is not disputed or contradicted by anything in the common law record.

The minute entry of June 18, 1928, recites the fact that a hearing on the question of mitigation or aggravation was held, that the court "heard all of the evidence adduced by the People as well as that adduced by the said defendant" and "heard the arguments of counsel for both parties" and recited that the matter was taken under advisement (Tr. pp. 9-10).

On June 29, 1928, the court entered its judgment and pronounced sentence of imprisonment for a period of ninety-nine years (Tr. pp. 10-12). The judgment order contains, *inter alia,* a recital of the fact of defendant's being "present in open court in his own proper person and by his attorney, L. W. Tuesburg."

The foregoing is a statement of the full substance of the common law record in this cause, which was the only record that was before the Supreme Court of Illinois.

SUMMARY OF ARGUMENT AND AUTHORITIES IN SUPPORT THEREOF.

I.

The Supreme Court of Illinois might, compatibly with federal due process, limit the scope of appellate review to matters appearing in the common law record, and might disregard self-serving statements of the accused as to alleged matters dehors the common law record.

Claassen v. *United States*, 142 U. S. 140, 147.
Mathews v. *United States*, 123 U. S. 182.
People v. *Street*, 353 Ill. 60.
People v. *Meyering*, 352 Ill. 314.
People v. *Bush*, 300 Ill. 532.
People v. *Stubblefield*, 391 Ill. 609.
People v. *Stack*, 391 Ill. 15.
People v. *Braner*, 389 Ill. 190.

II.

The common law record does not sustain the contention that petitioner was denied the right of counsel or any other federal constitutional right.

Adams v. *United States*, 317 U. S. 269.
Canizio v. *New York*, 326 U. S. 666.

ARGUMENT.

I.

The Supreme Court of Illinois might, compatibly with federal due process, limit the scope of appellate review to matters appearing in the common law record, and might disregard self-serving statements of the accused as to alleged matters dehors the common law record.

We deem it unnecessary to argue at length that a court of appellate review does not deny federal constitutional rights by confining the scope of its scrutiny to a properly authenticated record and that it need not consider such self-serving documents as litigants may choose to attach physically to the record as certified by the clerk of the lower court. This court's practice is to confine its review on appeals in criminal cases (the statutory substitute for the common law writ of error) to the record of the lower courts.

"Upon writ of error no error in law can be reviewed by this court which does not appear upon the record, or by bill of exceptions made part of the record" (*Claassen* v. *United States*, 142 U. S. 140, at page 147). Objection that the defendant was denied his constitutional right to be present at the time of sentence could not be entertained on writ of error where his claim of absence was based on alleged matter *dehors* the record. *Mathews* v. *United States*, 123 U. S. 182.

This principle is, we believe, universal in all American courts of appellate jurisdiction. The Illinois Supreme Court has always held that it could not review on writ of error any matter that was not either in the common law record or in a duly authenticated bill of exceptions.

Cases sustaining this rule are cited in the margin with quotation of applicable excerpts from the opinions of the court.[1]

These observations are important, not because they are overtly controverted by petitioner's counsel, or because they are doubtful, but because once it is perceived that the entire burden of petitioner's argument in this court is predicated both directly and indirectly upon his assertion of matters wholly ulterior to the record, it must be realized that his argument refers to no basis of which either the Supreme Court of Illinois or this court might properly take cognizance.

II.

The common law record does not sustain the contention that petitioner was denied the right of counsel or any other federal constitutional right.

It appears by the common law record that the petitioner was indicted for murder, that he was arraigned, that he

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[1] *People* v. *Street*, 353 Ill. 60, the court said at pages 62-63:

"* * * The rule is well settled in this State, as shown by numerous citations of authority in behalf of plaintiff in error, that the duty of a trial court to assign competent counsel to defend an accused person who is unable to employ counsel of his own is not intended as a mere empty formality, nor is counsel thus appointed required to act without being allowed a reasonable time to become familiar with the facts in the case and to prepare the defense. *While adhering to these rules of law, and desiring, whenever possible, to apply them in furtherance of substantial justice to all persons charged with crime, nevertheless it is of equal, if not greater, importance that this court should always confine its reviews to matters affirmatively appearing in the record before us.* Every fact and matter that the prisoner may deem essential to his rights and to a fair and regular trial which is not essentially a part of the record proper, must, if review be sought in relation thereto, be made a part of the record by a bill of exceptions. *People* v. *Munday*, 293 Ill. 191."

Matter appended to the transcript but not incorporated therein as a part of the common law record or by way of bill of exceptions, duly signed by the trial judge and filed and certified by the clerk, cannot be considered. *People* v. *Meyering*, 352 Ill. 314; *People* v. *Bush*, 300 Ill. 532; see also the cases to this effect cited by the Illinois Supreme Court in its opinion in the instant case, viz., *People* v. *Stubblefield*, 391 Ill. 609; *People* v. *Stack*, 391 Ill. 15; and *People* v. *Braner*, 389 Ill. 190.

indicated a desire to plead guilty, and that he had "fully explained" to him "the consequence of such plea and of all his rights in the premises, including the right to have a lawyer appointed by the court to defend him," his "right to a trial before a jury of twelve jurors" and "the degree of proof that would be required to justify a verdict of guilty against him under the plea of not guilty" which he had a right to enter; and that thereupon the defendant "persisted in his desire to plead guilty."

The court therefore had no alternative under Illinois criminal jurisprudence except to hear, without a jury, evidence and argument upon the issue of "mitigation or aggravation" of guilt, to the end that the court might be informed of the facts and circumstances that might properly bear upon the measure of the punishment to be inflicted upon the defendant. (Ill. Stats. Annotated, Ch. 38, par. 801.) This the court proceeded to do; but not until after counsel had been appointed for the prisoner.

It must be remembered that nothing in the common law record supports any of the petitioner's own statements or the statements of his counsel to the effect that he was ignorant of his rights, that he was a colored man who had killed a white man, that he entered a plea of guilty under fear of violence, or that the killing took place under circumstances even remotely resembling those narrated in the self-serving statements that petitioner attached to his common law record.

For example, nothing that was properly before either the Supreme Court of Illinois or that is before this court indicates whether petitioner killed the deceased as a result of an altercation over the use of a public highway (as petitioner's counsel says) or whether petitioner killed the deceased in a bank robbery, in a fight over the affections of a lady, or in a saloon brawl. If, acceding to the

importunities of petitioner's counsel in the instant case, this court should take the slightest cognizance of petitioner's and his counsel's excursions from the record into the realm of matter *in pais,* this court would in effect require every supreme court of every state, and presumably every circuit court of appeals, to decide cases upon wholly extrajudicial assertions appended by a convicted person to an otherwise properly certified record.

Stripped, then, of all matters *dehors* the record proper, this case presents only the naked facts that an accused was arraigned upon an indictment for murder, that he chose to plead guilty, that he was advised of his right of counsel, that he rejected the proffer of counsel and persisted in his plea, that he had the benefit of counsel upon the hearing with respect to aggravation or mitigation and that he was sentenced on his plea.

There are literally thousands of such records in the archives of both state and federal courts throughout the United States. If this case is to be reversed upon such a record, then the majority of those persons who have pleaded guilty and received a sentence are entitled to a reversal of their sentences; *and this even though the record may affirmatively show that the accused rejected the right of counsel and stated that he wanted to persist in his plea of guilty.*

Adams v. *United States,* 317 U. S. 269, is, we submit, so incisively pertinent as to be controlling in principle even though certain circumstances might differentiate its factual complex from that of the instant case.

In that case, as in the instant case, the defendant was tendered the assistance of counsel but, though he had pleaded not guilty to a charge of using the mails to defraud, he declined representation and insisted upon defending himself. He claimed and obtained the right to decide for himself whether he would face a jury or a bench trial, chose

and received the latter, and suffered conviction. Even though the charge was highly technical and it affirmatively appeared that the accused was not a lawyer, this court upheld his conviction.

Assimilating the case to one in which (as in the instant case) an accused pleads guilty without counsel, this court said (at pages 276-277):

> "* * * Legislation apart, no social policy calls for the adoption by the courts of an inexorable rule that guilt must be determined only by trial and not by admission. A plea of guilt expresses the defendant's belief that his acts were proscribed by law and that he cannot successfully be defended. * * * **And not even now is it suggested that a layman cannot plead guilty unless he has the opinion of a lawyer on the questions of law that might rise if he did not admit his guilt. Plainly, the engrafting of such a requirement upon the Constitution would be a gratuitous dislocation of the processes of justice.** * * *" (Emphasis supplied.)

It is quite true that this court indicated in the *Adams* case that "The question in each case is whether the accused was competent to exercise an intelligent, informed judgment" and that the question whether counsel has been unconstitutionally denied or properly dispensed with is not to be solved by "delusively simple rules of trial procedure which judges must mechanically follow."

But the utmost that this observation requires in the case at bar is that the trial court must exercise judicial circumspection in the matter of permitting accused persons to dispense with counsel. *Nothing in the instant record proper suggests or intimates that this was not done.* It must be remembered that *all* of petitioner's and his counsel's statements as to the facts and circumstances allegedly involved in, affecting or attendant upon the proceedings in the trial court are based upon statements that form no part of but completely transcend the record in this case.

In the federal courts, a full memorial of proceedings in a criminal case, when such a memorial is to be presented for appellate review, consists of two parts, a common law record and such recitals of proceedings *viva voce* (or matters otherwise not a part of the common law record) as are preserved in a bill of exceptions. (See cases cited, Point I, *ante*.) It must be presumed that if a bill of exceptions reciting *verbatim* the proceedings prior to, at and after arraignment had been tendered and signed in this case, it would have comported with the recital in the common law record that the accused was fully advised of his right to counsel. A contrary surmise (a) would contradict the presumption that trial courts respect the constitution and (b) would contradict the common law record.

It should be observed, moreover, the court did appoint counsel for the petitioner. It is quite true that the record formally limited the scope of counsel's duties to representing the prisoner on the issues pertinent to aggravation and mitigation; and we concede that, had the accused not explicitly waived his right to counsel before pleading guilty, such an appointment of counsel for purposes so limited would not have satisfied the requirements of due process.

The case bears analogy to *Canizio* v. *New York*, 326 U. S. 666. In that case, as in the case at bar, the accused entered a plea of guilty without the benefit of counsel. Indeed, in the *Canizio* case it did not appear that he was apprised of his right to counsel, whereas petitioner in this case had that right "fully explained" to him. In the *Canizio* case, as in the instant case, counsel appeared for the accused in apt time to apply for withdrawal of the plea of guilty; but in both the *Canizio* case and this case, counsel did not deem it to the best interests of the accused to attempt to withdraw the plea.

It is true that counsel in the *Canizio* case appeared generally for his client whereas in the instant case, counsel was appointed (technically, at least) only on the issue of aggravation and mitigation. This would be an important distinction between the two cases if petitioner in the instant case had not voluntarily waived counsel on arraignment after the court had advised him of his rights.

But even though petitioner waived his right to counsel, it cannot be presumed that both the trial court and counsel (even though counsel was technically appointed only for limited purposes) would hear the evidence pertinent to the case and would allow petitioner to stand convicted upon his plea of guilty without advising him of his right to withdraw the same if it were in his best interests to do so. The question whether the accused should take his chances with the jury or throw himself upon the mercy of the court on a plea of guilty was, as counsel for him in this court not only concedes but insists, a delicate one. On the naked common law record, it can not be presumed that both his counsel and the court were careless of his rights.

This case cannot be reversed on the common law record alone unless this court is prepared to hold that in every serious criminal case, the trial court must appoint counsel for the accused before receiving a plea of guilty; and this even though the accused declines counsel after having had his rights "fully explained" to him by the court. Nothing in the entire history of Anglo-American jurisprudence even suggests, much less requires, such a result. Neither the Fifth, the Sixth nor the Fourteenth Amendments has ever been construed by any court (insofar as patient research has disclosed) as requiring categorically, absolutely and mechanically that no man may plead guilty to murder, no matter what the circumstances, without counsel, even

though he says that he does not want counsel. Should this court commit itself to any such declaration in the instant case, many thousands of prisoners now incarcerated upon pleas of guilty entered after the right to counsel was declined would be set at large.

Such a result would, of course, not deter this court from such a declaration if it were convinced that the organic law of the United States could not otherwise be properly expounded. But the practical construction, acquiesced in by every *nisi prius* court and every court of review in the land from days long antedating the Constitution until the present moment, demonstrates conclusively and absolutely that such a holding would not serve the understanding either of the framers of the Constitution or of any of the many thousands of jurists and constitutional scholars who have perused and applied its text in criminal cases. And where the text of the constitution has long been construed by unanimous consensus, an exegetical reading overriding that consensus is certainly not necessary and, we submit for important reasons briefly noted in the margin, is not even appropriate.[2]

This is, of course, not to say that if the record shows that in a given case, the accused should have been tendered

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[2] A question theoretically implicit in every problem of constitutional construction and practically exigent in the instant case may be stated by asking, When the meaning of the constitution is sought, whose understanding is to determine the "meaning?" Is it the meaning of that instrument to its authors, or to those who adopted the constitution and the several amendments that have been added thereto by voting in favor thereof, or to academicians in the field of political philosophy, or to lawyers generally, or to the hypothetical "reasonable man"? And if the latter, then is it the probable meaning to the "reasonable man" of the time of the adoption of the constitution (or the amendment in question, as the case may be), or to the "reasonable man" of today? Or is it perchance a composite question of what ideas a "reasonable man of today" would ascribe to a putative "reasonable man" reading the constitutional language at the time of its adoption?

While it is this court that decides questions of constitutional interpretation, it does so upon the assumption that it is reading a document that has been read by others whose understanding of its language is im-

counsel in order to prevent a miscarriage of justice notwithstanding his refusal thereof, due process would not be denied. But unconstitutional denial of liberty should not be imputed to trial courts in contradiction of the recitals of the record and as against the presumption that constitutional rights have not been infringed.

CONCLUSION.

For the reasons urged in this brief, it is respectfully submitted that the judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Respondent.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

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portant. In short, this court must state its own understanding of a presumable "general" understanding of the constitution as a document, not of this court alone, but of the people.

In highly technical cases involving unusual and abstruse rights such as those arising in tax matters, the abstractions implied in the notion of a patent on a complex invention, or intricate property settlements, the court can consult only those general canons of natural justice and common understanding that may be presumed to illuminate the particular technical problem at hand. But in the instant case, the court is confronted with the simplest possible situation; a plea of guilty entered in a form and mode that has been known to the common law for centuries. Unanimous approbation of the acceptance of such pleas, where counsel is offered and declined is, we submit, not merely relevant but *conclusive* on what the constitution means in this connection to those intrusted with supporting and enforcing it.

dissent p. 5

SUPREME COURT OF THE UNITED STATES

No. 36.—October Term, 1946.

Harice Leroy Carter, Petitioner, v. The People of the State of Illinois.	On Writ of Certiorari to the Supreme Court of the State of Illinois.

[December 9, 1946.]

Mr. Justice Frankfurter delivered the opinion of the Court.

In 1928 petitioner pleaded guilty to an indictment for murder and was sentenced to imprisonment for 99 years. In 1945 he brought a petition for his release on writ of error in the Supreme Court of Illinois claiming that the conviction on which his confinement was based was vitiated by the denial of his right under the Fourteenth Amendment to the assistance of counsel. The Supreme Court of Illinois affirmed the original judgment of conviction. 391 Ill. 594. In view of the importance of the claim, if valid, we brought the case here. 328 U. S. —.

In a series of cases of which *Moore* v. *Dempsey*, 261 U. S. 86, was the first, and *Ashcraft* v. *Tennessee*, 327 U. S. 274, the latest, we have sustained an appeal to the Due Process Clause of the Fourteenth Amendment for a fair ascertainment of guilt or innocence. Inherent in the notion of fairness is ample opportunity to meet an accusation. Under pertinent circumstances, the opportunity is ample only when an accused has the assistance of counsel for his defense. And the need for such assistance may exist at every stage of the prosecution, from arraignment to sentencing. This does not, however, mean that the accused may not make his own defense; nor does it prevent him from acknowledging guilt when fully advised of all its implications and capable of understanding them. Neither the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a per-

son the right to defend himself or to confess guilt. Under appropriate circumstances the Constitution requires that counsel be tendered; it does not require that under all circumstances counsel be forced upon a defendant. *U. S. ex rel. McCann* v. *Adams*, 320 U. S. 220.

The solicitude for securing justice thus embodied in the Due Process Clause is not satisfied by formal compliance or merely procedural regularity. It is not conclusive that the proceedings resulting in incarceration are unassailable on the face of the record. A State must give one whom it deprives of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface. *Mooney* v. *Holohan*, 294 U. S. 103. Questions of fundamental justice protected by the Due Process Clause may be raised, to use lawyers' language, dehors the record.

But the Due Process Clause has never been perverted so as to force upon the forty-eight States a uniform code of criminal procedure. Except for the limited scope of the federal criminal code, the prosecution of crime is a matter for the individual States. The Constitution commands the States to assure fair judgment. Procedural details for securing fairness it leaves to the States. It is for them, therefore, to choose the methods and practices by which crime is brought to book, so long as they observe those ultimate dignities of man which the United States Constitution assures. *Brown* v. *New Jersey*, 175 U. S. 172, 175; *Missouri* v. *Lewis*, 101 U. S. 22, 31. Wide discretion must be left to the States for the manner of adjudicating a claim that a conviction is unconstitutional. States are free to devise their own systems of review in criminal cases. A State may decide whether to have direct appeals in such cases, and if so under what circumstances. *McKane* v. *Durston*, 153 U. S. 684, 687. In respecting the duty laid upon them by *Mooney* v. *Holohan*, States have a wide choice of remedies. A State may provide that the protec-

tion of rights granted by the Federal Constitution be sought through the writ of *habeas corpus* or *coram nobis*. It may use each of these ancient writs in its common law scope, or it may put them to new uses; or, it may afford remedy by a simple motion brought either in the court of original conviction or at the place of detention. See, *e. g.*, *New York ex rel. Whitman* v. *Wilson*, 318 U. S. 688; *Matter of Lyons* v. *Goldstein*, 290 N. Y. 19, 25; *Matter of Morhous* v. *N. Y. Supreme Court*, 293 N. Y. 131; *People* v. *Gersewitz*, 294 N. Y. 163, 168; *Matter of Hogan* v. *Court of General Sessions*, 296 N. Y. 1, 9. So long as the rights under the United States Constitution may be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated.

An accused may have been denied the assistance of counsel under circumstances which constitute an infringement of the United States Constitution. If the State affords no mode for redressing that wrong, he may come to the federal courts for relief. But where a remedy is provided by the State, a defendant must first exhaust it in the manner in which the State prescribes. *Ex parte Hawk*, 321 U. S. 114; *House* v. *Mayo*, 324 U. S. 42. For the relation of the United States and the courts of the United States to the States and the courts of the States is a very delicate matter. See *Ex parte Royall*, 117 U. S. 241, 251. When a defendant, as here, invokes a remedy provided by the State of Illinois the decision of the local court must be judged on the basis of the scope of the remedy provided and what the court properly had before it in such a proceeding. *Woods* v. *Nierstheimer*, 328 U. S. —. The only thing before the Illinois Supreme Court was what is known under Illinois practice as the common law record. That record, as certified in this case, included only the indictment, the judgment on plea of guilty, the minute entry bearing on sentence, and the sentence. And so the very narrow question now before us is whether this com-

mon law record establishes that the defendant's sentence is void because in the proceedings that led to it he was denied the assistance of counsel.

This case is quite different from a case like *Rice* v. *Olson*, 324 U. S. 786. In that case the record properly before this Court contained specific allegations bearing on the disabilities of the defendant to stand prosecution without the aid of counsel. There was not, as we have here, an unchallenged finding by the trial court that the accused was duly apprised of his rights and, in awareness of them, chose to plead guilty. The judgment against Carter explicitly states:

> "And the said defendant Harice Leroy Carter commonly known as Roy Carter having been duly arraigned and being called upon to plead expresses a desire to plead guilty to the crime of murder as charged in the indictment. Thereupon the Court fully explained to the Defendant Harice Leroy Carter commonly known as Roy Carter the consequence of such plea and of all his rights in the premises including the right to have a lawyer appointed by the Court to defend him and also of his right to a trial before a jury of twelve jurors sworn in open Court and of the degree of proof that would be required to justify a verdict of guilty against him under the plea of not guilty but the defendant Harice Leroy Carter commonly known as Roy Carter persists in his desire to plead guilty and for a plea says he is guilty in manner and form as charged in the indictment."

This, then, is not a case in which intelligent waiver of counsel is a tenuous inference from the mere fact of a plea of guilty. *Rice* v. *Olson*, *supra*, at 788. A fair reading of the judgment against Carter indicates a judicial attestation that the accused, with his rights fully explained to him, consciously chose to dispense with counsel. And there is nothing in the record to contradict the judicial finding. From the common law record, we do not know what manner of man the defendant was. Facts bearing on

his maturity or capacity of comprehension or on the circumstances under which a plea of guilty was tendered and accepted are wholly wanting. We have only the fact that the trial judge explained what the plea of guilty involved. To be sure, the record does not show that the trial court spelled out with laborious detail the various degrees of homicide under Illinois law and the various defenses open to one accused of murder. But the Constitution of the United States does not require of a judge that he recite with particularity that he performed his duty.

The only peg on which the defendant seeks to hang a claim that his right to counsel was denied is the fact that the judge did assign him counsel when it came to sentencing. From this fact alone, we are asked to draw the inference that the accused was not capable of understanding the proceedings which led to his plea of guilty, and was therefore deprived of the indispensable assistance of counsel. We cannot take such a jump in reasoning. A trial court may justifiably be convinced that a defendant knows what he is about when he pleads guilty and that he rightly believes that a trial is futile because a defense is wanting. But the imposition of sentence presents quite different considerations. There a judge usually moves within a large area of discretion and doubts. Such is the situation under Illinois law. The range of punishment which a judge in Illinois may impose for murder is between fourteen years and death. It is a commonplace that no more difficult task confronts judges than the determination of punishment not fixed by statute. Even the most self-assured judge may well want to bring to his aid every consideration that counsel for the accused can appropriately urge. In any event, the designation of counsel to assist the accused at the sentencing stage of the prosecution in no wise implies that the defendant was not capable of intelligent self-protection when he pleaded guilty. Cf. *Canizio* v. *New York*, 327 U. S. 82.

We conclude that on the record before the Supreme Court of Illinois there was no showing that Carter's plea of guilty was made under circumstances which cut the ground from under the resulting sentence. In restricting its review to that record the Supreme Court of Illinois followed local practice, and the practice constitutes allowable State appellate procedure. Factors that might suggest fundamental unfairness in the proceedings before the trial judge—*e. g.*, the racial handicap of the defendant, his mental capacity, his inability to make an intelligent choice, precipitancy in the acceptance of a plea of guilty—are not before us because they were not in the common law record which was all that was before the Supreme Court of Illinois. Whether the defendant is entitled to press such claims to show a denial by the State of Illinois of a constitutional right, it will be time enough to consider when that issue is properly before us after being presented in a proceeding in the State courts appropriate to that purpose, or, if none is available, in a federal court. *Woods* v. *Nierstheimer, supra; Ex parte Hawk, supra.*

After indicating the restricted scope of review in this proceeding, the court below observed that under Illinois law a defendant who desires counsel must ask for it and show that he cannot afford one of his own choice. There are situations when justice cannot be administered unless persons charged with crime are defended by capable and responsible counsel. But there is nothing in the record before us to indicate that the circumstances made it necessary for Carter to have professional guidance other than that given by the trial court. There is therefore nothing in the statement of the Illinois Supreme Court alone from which we can infer that these normal requirements of Illinois law prejudiced this defendant or made their observance in this case incongruous with his constitutional rights.

Judgment Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 36.—October Term, 1946.

Harice Leroy Carter, Petitioner,
v.
The People of the State of Illinois.

On Writ of Certiorari to the Supreme Court of the State of Illinois.

[December 9, 1946.]

Mr. Justice Douglas, with whom Mr. Justice Black and Mr. Justice Rutledge concur, dissenting.

If, as the opinion of the Court suggests, the Illinois Supreme Court had ruled that petitioner could not raise the question of his right to counsel by reason of the abbreviated common law record, I would agree that the judgment should be affirmed. For then petitioner would be remitted to other state procedures for vindication of his constitutional right. The Illinois Supreme Court rested on that ground when it refused to consider his claim that he was deprived of due process of law by reason of the method of his arrest and the unfairness of the trial. But when it came to consider the question of his right to counsel, the inadequacy of the record was not the ground it gave for barring him from showing that he was unqualified to waive the constitutional right:

> "His first contention is that the court erred in not appointing an attorney to represent him during arraignment. The right to be represented by counsel is one which the defendant may waive or claim, as he shall determine. No duty rests upon the court to provide legal assistance for an accused, unless he states, under his oath, his inability to procure counsel, and expresses a desire to have the court appoint one for him. (*People* v. *Braner*, 389 Ill. 190; *People* v. *Corrie*, 387 Ill. 587; *People* v. *Childers*, 386 Ill. 312.) There being no bill of exceptions, and it not appearing that plaintiff in error sought to have an attorney appointed for him, this assignment of error cannot be sustained. *People* v. *Stubblefield*, *post*, p. 609;

> *People* v. *Stack*, *ante*, p. 15; *People* v. *Braner*, 389 Ill. 190." 391 Ill. 594, 595; 63 N. E. 2d 763, 764.

By the rule there announced the record was inadequate only in one respect—the absence of a bill of exceptions showing that petitioner asked that an attorney be appointed for him. But that neglect by a defendant is not fatal, at least in a capital case. If a defendant is not capable of making his own defense, it is the duty of the court to appoint counsel, whether requested so to do or not. *Williams* v. *Kaiser*, 323 U. S. 471, 476. As we stated in that case, pp. 475–476:

> "The decision to plead guilty is a decision to allow a judgment of conviction to be entered without a hearing—a decision which is irrevocable and which forecloses any possibility of establishing innocence. If we assume that petitioner committed a crime, we cannot know the degree of prejudice which the denial of counsel caused. See *Glasser* v. *United States*, 315 U. S. 60, 75–76. Only counsel could discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate. A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutors' of the law's complexity, or of his own ignorance or bewilderment."

Therefore the least which we should do is to vacate this judgment and remand the case to the Illinois Supreme Court. For as MR. JUSTICE MURPHY points out, there is ample evidence in the record, certified to us from that court, to support petitioner's claim that he was not capable of making his defense. If that evidence may be considered in this proceeding, petitioner should prevail. Though the basis of the action of the Illinois Supreme Court be deemed less clear than I have indicated, a remand to it would be appropriate so that any state procedural question may be untangled from the question arising under the federal constitution. See *State Tax Commission* v. *Van Cott*, 306 U. S. 511.

SUPREME COURT OF THE UNITED STATES

No. 36.—October Term, 1946.

Harice Leroy Carter, Petitioner, v. The People of the State of Illinois. | On Writ of Certiorari to the Supreme Court of the State of Illinois.

[December 9, 1946.]

Mr. Justice Murphy, dissenting.

The admitted facts of this case plainly reveal that the petitioner has not been convicted of murder and sentenced to 99 years in prison in accordance with due process of law. Rather he has been deprived of his freedom for life without the aid of an attorney to guide him along the complicated and twisting labyrinths of the law. And there is no affirmative indication that he intelligently waived his right to counsel or that he understood the intricate legal problems involved in his indictment and conviction. Due process cannot thrive in the absence of such evidence.

There is an initial problem as to what evidence is before this Court at this time. It is said that we are limited to the common law record before the Supreme Court of Illinois, a record that includes only the indictment, the judgment on the plea of guilty, the minute entry bearing on the sentence, and the sentence itself. We are asked to close our eyes to a transcript of testimony in connection with a hearing on mitigation of the offense. This testimony was taken after the conviction. It has been certified, presumably by the stenographer recording the testimony at the hearing, and notarized. It appears in the printed record before this Court. We are also asked to overlook certain information about the petitioner given to the Illinois State Penitentiary by the State's attorney and concurred in by the presiding judge. The State of Illinois does not deny any of these facts; it merely requests that we disregard them as did the Supreme Court of Illinois, that we blind ourselves to what is printed in the record before us.

Legal technicalities doubtless afford justification for our pretense of ignoring plain facts before us, facts upon which a man's very life or liberty conceivably could depend. Moreover, there probably is legal warrant for our not remanding the case to the Supreme Court of Illinois to allow those facts to be incorporated in the formal record before it and to reconsider its decision in light thereof. But the result certainly does not enhance the high traditions of the judicial process.

In my view, when undisputed facts appear in the record before us in a case involving a man's life or liberty, they should not be ignored if justice demands their use. Here the facts in question fortunately are not crucial, since the bare common law record alone reveals a lack of due process. But the additional facts do serve to emphasize the absence of an intelligent waiver of counsel and petitioner's failure to comprehend the legal problems placed in his path. They serve to make any decision on the issue in the case more intelligent and more just. The discussion that follows, therefore, is based on all the certified facts in the record before us.

Petitioner, a Negro, was 30 years of age at the time of the relevant events in 1928. He had no schooling, although he was able to read and write. He was of average mentality and had never before run afoul of the law. During the preceding eleven years he had worked as a cook and a mechanic. By reputation he was quiet and industrious.

While driving a car back from a fishing trip, petitioner became involved in a bitter and prolonged dispute with the driver of a horse-drawn gravel wagon over the right-of-way on a road. This driver, a white man, refused to give petitioner enough room to pass. A violent argument in racial terminology ensued; rocks and gravel were thrown at petitioner's car. Eventually, when the dispute was renewed after a short interval, the driver got off his wagon and advanced toward petitioner's car. Petitioner

claimed that he thought the driver was reaching into his shirt for a gun. Petitioner got out of his car and fired three times, killing the driver.

Petitioner was taken into custody that same evening and was questioned far into the night. He was taken to an adjoining town, allegedly to avoid mob violence. Twelve days later, on June 12, 1928, he was indicted. It was charged that he "did then and there unlawfully, and feloniously, with malice aforethought, by shooting, kill" the named individual. On June 15 he was arraigned without the benefit of counsel, it being alleged by petitioner that he was held incommunicado from the time of his arrest. He was handed a copy of the five-page indictment, under which he could have been convicted of first-degree murder, lesser degrees of homicide, voluntary or involuntary manslaughter, assault with a deadly weapon, or lesser degrees of assault. Various considerations of defense, including self-defense, were accordingly raised. Upon being asked how he pleaded, he expressed a desire to plead guilty as charged in the indictment. The trial court's order, which bears striking resemblance to the Illinois statute on the subject (Ill. Rev. Stat., 1945, Ch. 38, par. 732), recited that the judge "fully explained" to petitioner "the consequences of such plea" and his rights to counsel and to jury trial, but that petitioner "persists in his desire to plead guilty" as charged. There is no affirmative evidence that petitioner understood the necessary consequences of his plea or that, fully appreciating all of his legal rights, he intelligently waived his rights to counsel or to jury trial. All that appears is that he "persisted" in his desire to plead guilty and that the court convicted him of murder, the statutory punishment for which was death by electrocution or imprisonment for any period from fourteen years to life.

A further hearing was held on the same day and an attorney was appointed, apparently not at petitioner's request, to represent petitioner at a hearing upon the

"question of mitigation or aggravation of said crime of murder to which defendant has pleaded guilty." Such a hearing was required by state law (Ill. Rev. Stat., 1945, Ch. 38, par. 732) where a guilty plea has been entered and where the court has discretion as to the extent of the punishment. A hearing on this matter was held three days later, on June 18, petitioner's appointed counsel being present. On June 29, in the absence of counsel, petitioner appeared in court and was sentenced to serve 99 years in prison.

I do not believe that these facts add up to due process of law. Petitioner, an uneducated, bewildered layman, was allegedly held incommunicado for fifteen days and was then called upon to make a vital decision upon the basis of his unintelligent understanding of the indictment—a legalistic, verbose document of five pages which would doubtless mean many things to many learned lawyers in light of the particular facts involved. Petitioner's very life and liberty depended upon his ability to comprehend the variety of crimes covered by the indictment and which one, if any, applied to the facts of his case. He was compelled to weigh the factors involved in a guilty plea against those resulting from the submission of his case to a jury. He was forced to judge the chances of setting up a successful defense. These are all complicated matters that only a man versed in the legal lore could hope to comprehend and to decide intelligently. Petitioner obviously was not of that type. Yet at this crucial juncture petitioner lacked the aid and guidance of such a person. In my view, it is a gross miscarriage of justice to condemn a man to death or to life imprisonment in such a manner. See *Powell* v. *Alabama*, 287 U. S. 45; *Williams* v. *Kaiser*, 323 U. S. 471; *Rice* v. *Olson*, 324 U. S. 786.

It is said, of course, that petitioner waived his right to counsel. My answer is that such action is immaterial in a capital case of this nature without affirmative evidence of an intelligent waiver. Such evidence is non-existent

here, even looking solely at the common law record. Its absence becomes even more emphasized when we view the background of ignorance, racial antagonism and threats of mob violence. When the life of a man hangs in the balance, we should insist upon the fullest measure of due process. Society is here attempting to take away the life or liberty of one of its members. That attempt must be tested by the highest standards of justice and fairness that we know. It is no excuse that the individual is willing to forego certain basic rights unless we are certain that he has a full and intelligent comprehension of what he is doing. Otherwise we take from due process of law a substantial part of its content.

Nor is it significant that counsel was appointed for petitioner to represent him at the hearing as to the mitigation of the offense. The error was done, the damage was committed, when petitioner was arraigned, compelled to plead and convicted without the assistance of counsel. The special hearing on mitigation held thereafter, for which counsel was provided, ~~provided~~ no opportunity for undoing the effect of the unaided arraignment or plea of guilty. Cf. *Canizio* v. *New York*, 327 U. S. 82. The failure to have counsel in regard to those matters permeated the entire proceeding, with indelible effects that could not be removed at the special hearing. Due process of law still was lacking.

Insistence upon counsel at all stages of a capital case, where an intelligent waiver is lacking, imposes no intolerable burden upon the law enforcement process. It is merely a recognition of our attempt to be civilized, a recognition that the process of condemning human life is to be judged by standards higher than those applied to a prosecution for violation of a minor ordinance or regulation.

I would therefore reverse the judgment below.